

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1195

To By Argued By
ROGER MILCH
15 Minutes

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-against-

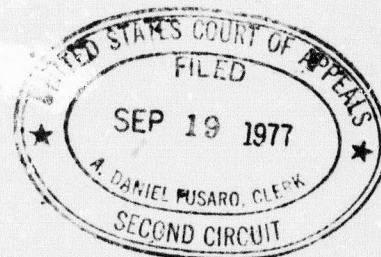
JOSEPH JAMES JACOBS,
Defendant-Appellant.

B
PJS
Docket No. 77-1195

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

X

BRIEF AND APPENDIX FOR THE APPELLANT



ROGER MILCH
Attorney for the
Appellant
Office & P.O. Address
The Inns of Court
99 Court Street
White Plains, N.Y. 10601
(914) 946-8430

PAGINATION AS IN ORIGINAL COPY

To By Argued By
ROGER MILCH
15 Minutes

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

Docket No. 77-1195

JOSEPH JAMES JACOBS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

X

BRIEF AND APPENDIX FOR THE APPELLANT

ROGER MILCH
Attorney for the
Appellant
Office & P.O. Address
The Inns of Court
99 Court Street
White Plains, N.Y. 10601
(914) 946-8430

TABLE OF CASES

<u>Anderson v. United States</u> , 417 U.S. 211, 94 S. Ct. 2253, 41 L. Ed. 2d 21 (1974).....	18.
<u>Cabbler v. Superintendant, Virginia State Penitentiary</u> , 374 F. Supp. 690 (E.D. Va. 1974).....	13.
<u>Cady v. Dombrowski</u> , 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973).....	13.
<u>Coolidge v. New Hampshire</u> , 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 565 (1971).....	10, 11
<u>Chapman v. California</u> , 368 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1965)	20
<u>Gustafson v. Florida</u> , 414 U.S. 260, 94 S. Ct. 488, 38 L. Ed. 2d 456 (1973).....	11
<u>United States v. Ailstock</u> , 546 F. 2d 1285 (6th Cir. 1976).....	20
<u>United States v. Calovich</u> , 393 F. Supp. 52 (W.D. Mo. 1973)	13
<u>United States v. Cavallino</u> , 498 F. 2d 1200 (5th Cir. 1974)	20
<u>United States v. Ceccolini</u> , 542 F. 2d (2d Cir. 1976)	14, 15
<u>United States v. Edwards</u> , 415 U.S. 800, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974).....	13
<u>United States v. Falley</u> , 489 F. 2d 33 (2d Cir. 1973).....	15
<u>United States v. Galante</u> , 547 F. 2d 733 (2d Cir. 1976).....	15
<u>United States v. Hale</u> , 422 U.S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975)	9
<u>United States v. Mullens</u> , 536 F. 2d 997 (2d Cir. 1976)	15
<u>United States v. Myers</u> , 550 F. 2d 1036 (5th Cir. 1977).....	20
<u>United States v. Rice</u> , 550 F. 2d 1364 (5th Cir. 1977)	20

TABLE OF CASES - cont'd

<u>United States v. Robinson</u> , 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973).....	11
<u>United States v. Santangelo</u> , 411 F. Supp. 1248 (S.D. N.Y. 1975).....	13
<u>United States v. Stevens</u> , 509 F. 2d 683 (8th Cir. 1975)	11,12,13

TABLE OF CONTENTS

PRELIMINARY STATEMENT.....	1.
STATEMENT OF FACTS.....	3.
ARGUMENT	
POINT I	6.
The conduct of the trial Judge denied appellant a fair trial.	
POINT II.....	9.
The Prosecutor's improper comments in his rebuttal sum- mation severely prejudiced appellant.	
POINT III.....	10.
The evidence seized from the Ford automobile should have been suppressed.	
POINT IV	14.
The accomplice's testimony should have been suppressed.	
POINT V	16.
The contents of the bag introduced by Detective DeBlassis should not have been received in evidence.	
POINT VI	19.
Evidence of subsequent similar acts should have been excluded.	
CONCLUSION	22.
APPENDIX	
DOCKET ENTRIES.....	A. 1.
INDICTMENT NO. 76 Cr. 597	A. 4.
CHARGE OF THE COURT	A. 7.

TABLE OF CONTENTS - cont'd.

DEFENDANT'S PRETRIAL MEMORANDUM OF LAW:	
RE: SUBSEQUENT SIMILAR ACTS.....	A.36
GOVERNMENTS'S PRETRIAL MEMORANDUM OF LAW:	
RE: SUBSEQUENT SIMILAR ACTS.....	A.37

PRELIMINARY STATEMENT

The Defendant, appeals, pursuant to Federal Rules of Appellate Procedure Rule 4(b), from a judgment of conviction rendered April 1, 1977 by Honorable Mark A. Constantino, United States District Judge for the Eastern District of New York sentencing the Appellant to an indeterminate term of imprisonment of up to twelve years for a violation of Title 18, United States Code §2113(d) and a concurrent indeterminate sentence of imprisonment not to exceed five years upon his conviction for violation of 18 U.S.C. § 371, on the second and third counts of the indictment. Appellant is presently incarcerated pursuant to said judgment.

Indictment 76 CR 597, filed September 16, 1976, charged Mr. Jacobs with violating Sections 2113(a) and (d) of Title 18 United States Code in that he allegedly committed an armed bank robbery of the Citibank, 35-31 Francis Lewis Boulevard, Queens, New York, on July 27, 1976 and took approximately One Thousand Nine Hundred Ninety Seven Dollars and Ninety Five Cents (\$1,997.95). Appellant was further accused of conspiring in violation of 18 U.S.C. §371, with one Brian Toth during the period July 26 to July 27, 1976, to commit a bank robbery.

Prior to trial, Appellant made a motion to suppress physical evidence seized from the said Brian Toth, on August 2, 1976, and to further suppress Toth's testimony. In addition, Appellant sought to preclude admission of testimony concerning

subsequent similar acts committed.

On February 2, 1977, Appellant gave testimony on his motion to suppress physical evidence. The Trial Court found he had standing to make the motion. Thereafter, former Yonkers Detective Armando DeBlassis testified concerning the seizure of contraband, and other articles, from Brian Toth, in Yonkers, New York on August 2, 1976. After the detective's testimony, the Court denied Appellant's motion to suppress.

The proceedings of February 7, 1976 included a hearing to suppress certain statements allegedly made by Appellant and oral argument concerning Appellant's application to have the Trial Court bar admission of evidence during the trial of subsequent similar criminal acts. Judge Constantino ruled adversely to Appellant on both points. The balance of the day was spent in jury selection.

Testimony at the trial was taken on February 8 and 9, 1977. The Trial Court submitted the case to the jury on February 10. After deliberating overnight, the jury found Appellant guilty of all three counts in the indictment.

On February 18, Appellant moved for a new trial, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, on the following grounds: 1) The Government failed to prove a continuing conspiracy from prior to July 27, 1976 to August 2, 1976.

Accordingly, testimony subsequent to July 27 should not have been received; 2) Contraband recovered August 3, 1976 was never adequately connected to Appellant and its admission into evidence was improper and; 3) A misstatement of fact of a

matter not in evidence in the Prosecutor's rebuttal summation denied Appellant a fair trial.

Without ever receiving responsive papers from the Government, or allowing oral argument, Judge Constantino denied the motion on April 1, 1977. He then sentenced Mr. Jacobs as described above. Notice of Appeal was filed on the same date.

THE FACTS

Brian Toth, a twenty-six year old narcotics addict with a prior history of four felony robbery convictions and one conviction for possession of a knife was the main Government witness. The "reputable" citizen admitted to possession of illegal handguns and sale of heroin during his limited non-prison existence which lasted only from March to August, 1976 (50,106-116)*.

After exacting a promise from Mr. Schulman, counsel for the Government, that his cooperation would be noted with the Westchester County District Attorney where he was facing life imprisonment, with the New York State Division of Parole and that he would not be prosecuted for the bank robbery he committed, Toth told his story to the Government. (130, 121-22).

On July 22, or 23, 1976 the Appellant, Toth and one Joseph Giannone (Toth's partner in heroin distribution and former prison friend (125-126) allegedly met in the bedroom of Toth's girlfriend's apartment in Brooklyn. They discussed a

*References are to page numbers of the trial testimony. References to hearing minutes will be marked "H" with appropriate pagination and date.

a bank, payroll or jewelery robbery and agreed to initially rob a bank (53-4).

Giannone and Toth stole a car. After supposedly relinquishing his role in the bank robbery plan, Giannone lent Toth his own Cadillac (60-64).

Toth stated that on July 27, 1976 he drove the stolen car to the bank. The masked Mr. Jacobs supposedly entered with a sawed-off shotgun. Less than a minute later, Appellant fled the bank. Strangely enough, Toth testified that he and Mr. Jacobs later divided the illicit proceeds of Twenty-One Hundred Dollars, over One Hundred Dollars more than actually was stolen, in the Brooklyn apartment (65-67,69).

On the following Sunday, August 1, 1976, Toth arranged with Steven Seifert, a life long acquaintance and State Prison associate, to become a driver for another bank robbery the following day. Based on Toth's knowledge of Westchester County, the trio supposedly opted for the Bank of America on Bronx River Road in Yonkers (70-72; 124). Again, Toth used Giannone's Cadillac, but this time, rather than borrowing it, rented same (74).

Toth testified that, on August 2, 1976, several abortive attempts were made to rob the Yonkers bank and when he believed he was under Police surveillance he stayed in a stolen Ford automobile and Seifert and Appellant drove away in Giannone's Cadillac (76-7)

Detective DeBlassis directed a search of Toth's Ford, although he had not idea that a crime had been committed. A .32 caliber revolver, a sawed-off shotgun and an airline bag with

masks, walkie-talkies and ammunition was recovered (183-4;188).

Some distance away from the location of the Ford, Officer Forella arrested Appellant and Steven Seifert apparently for the "crime" of walking in the streets of Yonkers (149-50).

The day following the arrests, August 3, 1976, Detective DeBlassis responded to the garden of a home owned by a Mrs. Moore. He seized a white plastic bag which contained weapons, a wallet with some of the money from the bank in Queens and personal papers of the Appellant, as well as pants (192-3;205**).

Evidence was introduced by the defense that in August, 1976 that the Federal Government and the Westchester County District Attorney were threatening Toth with life imprisonment and that "he had to find a way out of it and he had to get out from under it somehow." The informant was also concerned about the effect on his girlfriend(249). After being transferred to the Federal jail, he married the girlfriend(119).

**Reference is to both pages which correctly should be marked 205 and 206. In actuality they are denominated 203 and 205.

ARGUMENT

POINT I

The conduct of the trial Judge denied
appellant a fair trial.

The Trial Court constantly allowed the Assistant United States attorney to lead the witnesses through their testimony (75-79, 148, 184).

The Judge also aided counsel for the Government by telling him what questions to ask to insure that certain physical evidence would be admitted (87,89,95).

Additionally, the Bench in its zeal to help the Prosecutor asked Toth the following question so that other evidence could be introduced:

"Are there any markings on it that
would indentify it?"

Despite the witness' negative response the article was allowed in evidence (91-92).

Similarly, the Judge smoothed the Government's path by asking the significant questions of Officer Forella (152-3, 171).

When Detective DeBlassis was on the stand the Judge again laid the groundwork for the Assistant United States attorney to refresh the witness' recollection (189).

Shortly thereafter, the Trial Court properly sustained an objection, but belittled defense counsel for making it when it commented as follows:

"I must comment at this time, sometimes
to ordinary lay people it doesn't seem

--something seems wrong. He's reading it. Why can't he tell us? It just so happens that is the way the rule is. I think it is ridiculous myself sometimes. But I must rule that way. He's reading it. What difference does it make how he does it? All right. I can't change the law though, they will get angry with me." (190-91).

The Government's lawyer wanted the defense witness, McCaffrey, held until the following day for possible further cross-examination. The supposedly impartial arbiter strongly urged the Prosecutor not to ask any more questions because the witness' credibility had already been destroyed, in the Judge's opinion (254-56).

Most significantly, on the defendant's pre-trial motion to suppress all testimony concerning appellant's activities in Yonkers after the date of the bank robbery in question, the Trial Court refused to keep an open mind concerning the admission of the testimony. It stated:

"The truth of that matter if I allow it now you could almost lay your life on it, it will go right through the entire trial. I wouldn't change my mind more than likely. It has to be a real serious situation that develops to make the Court reverse itself, otherwise I go right through. I keep saying this from the bench when a defendant sits there he doesn't sit there as a Catholic Priest or a Rabbi; right there there is a prejudice." (H, February 7, 1977, 7).

Shortly thereafter the Judge reiterated his position when he said:

"I'll allow the testimony. I'm almost certain I won't change my mind." (H, February 7, 1977, 8).

The result of all of the foregoing is that the Govern-

ment received immeasurable assistance from the bench. Concededly, none of these actions individually would constitute plain error. In the totality, however, they deprived appellant of a fair trial.

POINT II

The Prosecutor's improper comments in his rebuttal summation severely prejudiced appellant.

In summation, defense counsel suggested that the Jury compare photographs of the bank robber with their recollection of Brian Toth's physique as he sat on the witness stand (296).

At no time during the course of the trial was the accomplice exhibited to the Jury other than seated. Apparently, the Government's lawyer was concerned that the Jury found the defendant's argument to be meritorious. Since the Jury never saw Toth in a standing position, the only way the Assistant United States attorney could inform the Jury of the accomplice's actual height was to improperly testify. Which is exactly what he did when he stated:

"He also points to Mr. Toth saying maybe he went into the bank, he has broad shoulders. Look at his height It is 5 foot 8 inches. I ask you to use your observation." (300).

Of course, it was exactly because of the Jury's inability to accurately observe Toth's height that the Prosecutor felt compelled to inform them about it.

In the defendant's view, the Prosecutor's comments created an intolerably prejudicial impact on the Jury. Therefore, reversal is required. (United States v. Hale, 422 U.S. 171, 95 S. Ct. 2133, 45 L. Ed 2d 99 (1975)).

POINT III

The evidence seized from the Ford automobile should have been suppressed.

The Appellant testified on the motion to suppress the physical evidence seized from the Ford driven by the accomplice, Toth, on August 2, 1977 (H, February 2, 1977, 13-35)

After Mr. Jacobs concluded his testimony, the Trial Court found he had standing to make the motion (H, February 2, 1977, 36)

The Government's witness on the motion was Detective DiBlassis. He stated that he had received a communication from uniformed officers that the Cadillac and Ford had been followed and that the persons therein were acting in a "suspicious manner." After unsuccessfully attempting to discover whether the Ford was a stolen car, the detective followed Brian Toth in the Ford for about three minutes and then pulled him over. The informant was unable to produce a license or registration. DiBlassis observed that the ignition was removed from the dashboard. Toth was placed under arrest for driving without a license and registration. Thereafter, DiBlassis ascertained that the Ford was in fact, stolen. He radioed to the uniformed men to apprehend Appellant and Mr. Seifert. After all three defendants were at the location of the Ford, the search ensued (H, February 2, 1977 40-46, 54)

The word "automobile" is not a talisman
in whose presence the Fourth Amendment
fades away and disappears"

So said Mr. Justice Stewart in Coolidge v. New Hampshire

(403 U.S. 443, 461, 91 S. Ct. 2022, 2035, 29 L. Ed 2d 565 (1971)). The Government in the instant case seeks to extend the concept that the right to search persons incident to arrest automatically grants to the arresting officer the right to search the arrestee's vehicle, Appellant respectfully disagrees with that proposition.

It is conceded that once an individual is lawfully arrested a search of his person does not violate his Fourth Amendment rights even if the arrest is not for a crime (United States v. Robinson, 414 U.S. 218, 94 S. Ct 467, 38 L.Ed. 2d 427 (1973); Gustafson v. Florida, 414 U.S. 260, 94 S. Ct. 488, 38 L.Ed 2d 456 (1973)).

Neither Robinson nor Gustafson invalidated the rule that before a search of a vehicle be permitted as incident to a lawful arrest the search must have a reasonable nexus to the crime for which the person was arrested (United States v. Stevens, 509 F. 2d 683, 687, (8th Cir. (1975)); Cert. denied; 421 U.S. 989, 95 S. Ct. 1993, 44 L.Ed.2d 479 (1975)).

In Stevens, the search was upheld. However, the factors present that allowed the Court to reach that conclusion are absent herein. After stopping the car in Stevens upon information that the car was wanted for a prior burglary, a frisk of one of the occupants revealed a shotgun shell. The search was a limited one for a sole particular purpose, to insure the safety of the officers.

The Stevens Court, at Pages 688-89, found that the search met the following four part test: (1) the original stop was

not pretextual, (2) the search was not based upon an unrelated minor traffic offense, (3) reasonable suspicion of serious criminal activity existed and (4) there were reasonable grounds to believe a weapon was near at hand.

In the instant case, the search fails to measure up to any of these standards. The stop here was purely pretextual. Detective DiBlassis' information was solely that people were acting in a suspicious manner. He observed no violation of law that would have justified police action on his part (H, February 2, 1977, 50-51).

Unlike Stevens, the intention to search the Ford was based upon the traffic offenses committed and the broken ignition lock (H, February 2, 1977, 52). DiBlassis had his mind made up even before he knew the car was stolen.

Even after he found out that Toth had been driving a stolen car, there was no knowledge of serious criminal activity analogous to the past commission of a burglary.

Finally, item four, which clearly constituted the most important reason why the Court in Stevens upheld the search, is totally missing in this case. Toth had been frisked and no weapon or ammunition had been found. Messrs. Jacobs and Seifert had been secured in a patrol car. DiBlassis also testified that there was no jeopardy to the policemen (H, February 2, 1977, 57-59). Thus, this was not a search for weapons since there were absolutely no grounds for a belief that any weapons existed. It was exactly what the Fourth Amendment prohibits, a search for the purpose of finding anything.

United States v. Santangelo (411 F. Supp. 1248 (S.D. N.Y. 1975) agrees with the Eighth Circuit's position, taken in Stevens, that car searches are invalid after arrests for traffic infractions

Other Federal Courts have reached the same conclusion even after the Robinson-Gustafson decisions. (United States v. Calovich, 392 F. Supp. 52 (W.D. Mo. 1973); Cabbler v. Superintendent, Virginia State Penitentiary, 374 F. Supp. 690 (E.D. Va. 1974)

The only other Supreme Court cases that are at all relevant to this issue are United States v. Edwards and Cady v. Dombroski (415 U.S. 800, 94S. Ct. 1234, 39 L. Ed. 2d 771 (1974); 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). Both are clearly distinguishable from the case at Bar.

In Edwards the arrestee's clothes were examined. Paint chips were found thereon which matched those from the post office where the defendant was apprehended in a burglary attempt. Probable cause existed for the search for this specific evidence.

The revolver recovered in Cady, upon the opening of the car trunk, was not suppressed because the motivation of the officers there was to secure a fellow policeman's gun and not to search for criminal evidence.

In contradistinction, Detective DiBlassis' purpose was to violate Mr. Justice Stewart's caveat and Appellant's Fourth Amendment rights.

The contraband seized from the Ford should have been suppressed.

POINT IV

The accomplice's Testimony should have been suppressed.

As noted in Point III above the evidence illegally seized from the Ford automobile driven by Brian Toth should have been suppressed by the Trial Court.

Recently, this Court held testimony that was the direct result of an illegal search to be inadmissible even though not the product of coercive conduct on the part of the Government (United States v. Ceccolini, 542F 2d 136 (2d Cir. 1976)).

In the case at bar, Brian Toth's testimony was certainly not that of a volunteer. Upon his initial interview with Federal Bureau of Investigation agents he denied knowledge of the Queens bank robbery. Both the accomplice and appellant were transported from Westchester County Jail to the Eastern District Courthouse on September 8 or 9, 1976** (The record is barren of any indication that either of them requested the trip to Brooklyn.) Possibly by chance, Toth was taken to the Assistant United States attorney's office first. After extracting a promise that he would not be prosecuted for the bank robbery and that the Government would aid him with his problems with the Westchester County District attorney and the New York State Division of Parole, Toth agreed to cooperate and testify against appellant (126-130)

**Although appellant was indicted in Westchester County for three counts of possession of weapons and one count of criminal possession of stolen property, all charges were dismissed December 2, 1976 in County Court, Westchester County.

Absent the illegal search, the record is devoid of even a shred of evidence which would demonstrate that the Government would have been able to obtain Toth's testimony (cf. United States v. Falley, 489 F. 2d, 33, 40-41 (2d Cir. 1973)).

In contradistinction to Ceccolini stands United States v. Mullens. (536 F. 2d 997 (2d Cir. 1976)) The defendant in Mullens came forward on his own and the incriminating statements were offered against himself. As noted above, Toth's conduct compels the conclusion that at no time did he take any initiative to become a witness for the Government.

Also distinguishable is United States v. Galante. (547 F. 2d 733 (2d Cir. 1976)). The star witness in Galante cooperated immediately and showed the searchers where the contraband was secreted. However, as Chief Judge Kaufman noted in his concurring opinion, at page 737, the stolen merchandise would have been discovered in any event.

Thus, Falley and Galante are analogous in that independent investigation would have produced the same results despite the illegal search.

Here, the only link between Toth and the United States was the violation of Toth's Fourth Amendment rights by the Yonkers Police Department. Accordingly, the testimony of the accomplice should have been suppressed.

POINT V

The contents of the bag introduced by Detective DeBlassis should not have been received in evidence.

Evidence offered by the Government, through Detective DeBlassis, was extremely damaging to Appellant. There were weapons in the bag as well as a wallet which allegedly contained money from the bank robbery and personal papers of Mr. Jacobs.

The Government made absolutely no attempt to establish a chain of custody for the introduction of this evidence. Rather, it relied on inadmissible hearsay testimony given by Detective DeBlassis. In a successful effort to improperly draw an inference that Appellant threw the bag into Mrs. Moore's yard the detective testified that the yard was "two houses up the street" from the location where Appellant was arrested by the uniformed officers (203). This statement was clearly hearsay because the detective was at least five minutes driving time away from the officers and could not have observed the arrest (209).

More significantly, he testified that the bag was in the same condition as it was when Mrs. Moore supposedly found it (210).

The Government never called Mrs. Moore to the stand. Nor did it explain her unavailability.

Of the twenty-three defined exceptions to the hearsay rule where the availability of the declarant is immaterial only exception (1) need be considered since the others certainly are not germane to the instant case (Federal Rules of Evidence, Rule 803).

There was no testimony offered as to when Mrs. Moore first discovered the bag, whether she examined it, or how soon afterwards she notified the police. Clearly, the statement was not one made while perceiving the condition. Since there is a total absence of testimony on the point it can not be said that the statement was one made immediately after perceiving the condition. (Rule 803(1)).

It should be observed that the statement could not have been made immediately after the event, if one accepts the Government's theory of the case, because the statement was made the day following the Yonkers arrest (209-10). The Government's position, supported by hearsay, was that the bag was thrown prior to Appellant's apprehension on August 2, 1976. If the Government is now to argue that the bag arrived on Mrs. Moore's lawn on August 3 and the detective was offering a statement made immediately after the event, the Appellant, accomplice and Mr. Siefert would have been incapable of putting it there since they had been in custody for a day.

Thus, the statement does not fall within the parameters of exception (1) of Rule 803. Although it conceivably could fall under exception (24) no advance notice was given to defense counsel. Exception (b)(5) of Rule 804 does not apply for the same reason.

The statement does not qualify as one of the hearsay exceptions of Rule 804(b)(1) to (b)(4). Further, we note that no proof was offered that the declarant was unavailable.

The two above statements were offered solely to link Appellant to the contents of the bag shortly prior to his arrest on August 2, 1976. As such, they were extrajudicial statements offered for the purpose of showing the truth of the matter asserted and should have properly been excluded (Anderson v. United States, 417 U.S. 211, 219-20, 94 S. Ct. 2253, 2260, 41 L. Ed 2d 21 (1974)).

The significance of the testimony can not be overstated. The crucial connection to the Queens bank robbery was that the money and personal papers were found in the wallet (193). Not surprisingly, Appellant's fingerprints were found on some of his personal papers (227). However, none of his finger prints appeared on the money or the wallet itself. As a result, the improper inference drawn from the statements that should have been excluded was essential to his conviction. This conclusion is further buttressed by the fact that the only testimony the jury desired to have read to them related to this issue (346-48).

The Trial Court erred when it allowed the contents of the bag to be received in evidence. Reversal is mandated for that error.

POINT VI

Evidence of subsequent similar acts
should have been excluded.

Brian Toth testified concerning his participation and that of the defendant in the Queens bank robbery of July 27, 1976. He was also allowed to testify concerning a plan to rob a bank in Yonkers with Mr. Jacobs and one Stephen Seifert on August 2, 1976.

The defendant strenuously objected to its introduction prior to trial by submitting a memorandum and during the proceedings of February 7, 1977 (H, February 7, 1977, 3-8; appendix 36)

Rule 404(b) of the Federal Rules of Evidence is designed specifically to preclude such testimony unless one or more of its recognized exceptions are met.

The Government's position was twofold. First, that evidence would allow proof of a larger conspiracy. Second, the evidence was relevant on the issue of identity.

The first contention is faulty because the indictment limits itself to the period July 25 to July 27, 1976. Toth's testimony would have been sufficient to prove that during that three day span the duo met, planned and committed the bank robbery.

We submit that identity was never in issue, even though proof of same is one of the statutory exceptions to Rule 404(b).

Toth identified Mr. Jacobs as the perpetrator. There could not be more convincing evidence of identity than that, if the accomplice was credible.

Since the prejudice against the defendant is so great when evidence of other crimes are introduced the burden falls upon the Prosecutor to demonstrate substantial need for the probative value of such evidence. (United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977)).

Thus, in United States v. Cavallino, (498 F. 2d 1200 (5th Cir. 1974) admission of other similar acts in a bank robbery case was allowed because there was no other evidence available. In comparison, the same circuit expressly disapproved of the introduction of such unnecessary evidence in United States v. Rice (550 F. 2d 1364, 1372 (5th Cir. 1977)).

For the Government to sustain the burden of overcoming the improper admission of the appellant's acts in Yonkers it must demonstrate that the evidence against the defendant was so overwhelming that it could be said that the reception of the evidence was harmless error beyond a reasonable doubt (Chapman v. California 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed.2d 705 (1965); United States v. Rice, *supra*; United States v. Ailstock, 546 F. 2d 1285 (6th Cir. 1976)).

The conviction in Rice was affirmed despite the error in admitting uncharged crimes because fourteen (14) witnesses testified for the Prosecution. Further, the reference to other similar criminal acts was fleeting. The defendant's guilt there was overwhelmingly proven and the error ultimately deemed harmless.

Here, the picture is sharply different. The Government's case without the improperly introduced evidence consisted of Toth, the bank manager, (who did not identify appellant) and photographs.

Surely, it can not be said that if the Government had been limited to evidence solely concerning the Queens bank robbery that the proof was so overwhelming that the admission of the later similar acts would constitute harmless error beyond a reasonable doubt.

Accordingly, evidence concerning the subsequent similar acts should never have been received.

CONCLUSION

For the reasons herein set forth, the conviction should be reversed.

Respectfully submitted

ROGER MILCH
Attorney for Defendant/Appellant
Office and P.O. Address
The Inns of Court
99 Court Street
White Plains, New York 10601
(914) 946-8430

DOCKET ENTRIES

9/10/76 Petition for Writ of Habeas Corpus ad Prosequendum received in this office-see same on file.

9/16/76 Defendant indicted - no number available.

9/16/76 Before CATOGGIO, J. - Indictment filed.

9/21/76 Petition for Writ of Habeas Corpus Ad Prosequendum issued.

9/24/76 Before CATOGGIO, J. - Case called. AUSA present. Defendants counsel present. Defendant after being advised of his rights and on his own behalf enters a plea of not guilty. Bail fixed at \$50,000 Surety - case set down before Judge Neaher 10/1/76 at 10 A.M. for trial date and set all motions.

9/30/76 By MISHLER, CH. J. - Writ issued.

10/ 1/76 Before NEAHER, J. - Case called - Defendant and counsel E. Cunningham present. Defendant informs Court of his desire to have Roger Milch, Esq. appointed to represent him-Granted-Present counsel to remain until new counsel is available-Case adjourned to 10/7/76 at 10 A.M. for status report.

10/ 4/76 Financial affidavit filed.

10/ 5/76 Petition for Writ of Habeas Corpus Ad Prosequendum returned and filed executed.

10/ 5/76 Petition for Writ of Habeas Corpus Ad Prosequendum issued.

10/ 7/76 Petition for Writ of Habeas Corpus Ad Prosequendum returned and filed executed.

10/ 7/76 Appointment of counsel filed.

10/ 7/76 Before NEAHER, J. - Case called. Defendant and counsel present. Defendant waives his 90 day right to a speedy trial. The Court finds that the interests of the public and the defendant are not prejudiced by the waiver of the 90 day rights. Case adjourned to 12/15/76 at 10:00 A.M. for motions.

11/ 3/76 Notice of readiness for trial filed

12/ 9/76 Notice of motion filed pursuant to Rule 12(b)(3)

for suppression of testimony, evidence, etc., and forwarded to chambers.

12/ 9/76 Defendants memorandum of law to support above motion filed and forwarded to chambers.

12/14/76 By NEAHER, J. - Writ issued.

12/15/76 Before NEAHER, J. - Case called. Defendant and counsel present. Defendant's motion to suppress adjourned to day of trial on 12/14/76. Defendant begins Federal custody. Case adjourned to 1/24/77 at 10:00 A.M. for trial.

1/31/77 Government's Memorandum of Law filed and forwarded to chambers.

2/ 2/77 Before COSTANTINO, J.-Case called. Defendants and counsel present. Hearing ordered and begun. Motion to suppress denied. Hearing concluded.

2/ 3/77 Stenographer's Transcript dated February 2, 1977 filed.

2/ 7/77 By COSTANTINO, J.-Order filed that the U.S. Marshal deliver Daniel McCaffrey before the Judges of this Court on 2/9/77 at 10:00 A.M.

2/ 7/77 By COSTANTINO, J. -Hearing on Motion to suppress statements ordered and begun. Motion denied. Hearing concluded.

2/ 7/77 Before COSTANTINO, J.- Case called. Defendant and attorney, Roger Milch, present. Jurors selected and sworn. Trial begun, trial continued to 2/8/77.

2/ 8/77 Before COSTANTINO, J.-Case called. Defendant and attorney present, trial resumed, trial continued to 2/9/77.

2/11/77 Writ returned and filed executed.

2/11/77 By COSTANTINO, J.-Order of sustenances filed (supper and 1 cocktail and transportation).

2/ 9/77 Before COSTANTINO, J.-Case called. Trial resumed motion to dismiss denied. Trial continued to 2/10/77.

2/10/77 Before COSTANTINO, J.-Case called. Trial resumed trial continued to 2/11/77.

2/11/77 Before COSTANTINO, J.-Case called. Trial resumed Jury resumes deliberation at 10:00 A.M. Jury returns at 11:10 A.M. and finds the defendant guilty on each of the counts 1, 2 and 3. Sentence adjourned without date. Trial concluded. Jury polled and discharged.

2/14/77 Stenographer's Transcripts dated February 8, 1977, February 9, 1977 and February 11, 1977 filed.

2/14/77 Voucher for Compensation for Expert Services filed and forwarded to Washington for Payment.

2/22/77 Notice of motion for a new trial filed (ret.3/18/77)

3/24/77 Transcript dated 2/10/77 filed

4/ 1/77 Before COSTANTINO, J. Case called. Defendant and attorney, Roger Milch, present. Defendant is sentenced to 12 years imprisonment on count 2 and five years on count 3 to run concurrently. Imposition of count 1 is suspended and merged with count 2. Defendant's counsel to file a Notice of Appeal.

4/ 1/77 Judgment and commitment filed. Certified copies to Marshal.

4/ 1/77 Voucher for expert services filed forwarded for payment.

4/12/77 Certified Copy of Judgment and commitment returned and filed from Marshal. Defendant delivered on 12/14/76 to M.C.C., New York.

4/18/77 Record on appeal certified and mailed to the C of A.

4/18/77 Voucher for compensation for appointment of counsel forwarded to C of A for approval.

4/21/77 Copy of Order filed received from the Court of Appeals that the record be docketed on or before 4/19/77, in default of which the appeal shall be dismissed forthwith.

5/ 4/77 Voucher for Compensation for Expert Services filed and forwarded to Washington for payment.

5/11/77 Stenographer's Transcript dated April 1, 1977 filed

6/ 7/77 Voucher for compensation of counsel Roger Milch filed and forwarded for payment.

6/13/77 Stenographer's Transcript dated April 1st, 1977 filed.

6/17/77 Voucher for Compensation for Expert Services filed and forwarded to Washington for payment (V #72153)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA

-against-

JOSEPH J. JACOBS,

Defendant.

I N D I C T M E N T

Cr.No. 76CR597
(T.18, U.S.C., §2113(a),
2113(d) and §371)

9-16-76

-----X

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 27th day of July, 1976, within the Eastern District of New York, the defendant, -JOSEPH J. JACOBS, knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Citibank, 35-31 Francis Lewis Boulevard, Queens, New York, approximately One Thousand Nine Hundred Ninety Seven Dollars and Ninety Five Cents (\$1,997.95), in United States currency, which money was in the care, custody, control, management and possession of the said Citibank the deposits of which Citibank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, §2113(a)).

COUNT TWO

On or about the 27th day of July, 1976, within the Eastern District of New York, the defendant, JOSEPH J. JACOBS, knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Citibank 35-31 Francis Lewis Boulevard, Queens, New York, approximately

One Thousand Nine Hundred Ninety Seven Dollars and Ninety Five Cents (\$1,997.95), in United States Currency, which money was in the care, custody, control, management and possession of the said Citibank the deposits of which Citibank were then and there insured by the Federal Deposit Insurance Corporation and in commission of this act and offense the defendant, JOSEPH J. JACOBS, did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon. (Title 18, United States Code, §2113 (d)).

COUNT THREE

On or about and between the 25th day of July, 1976, and the 27th day of July, 1976, both dates being approximate and inclusive, within the Eastern District of New York, the defendant, JOSEPH J. JACOBS and Brian Toth, named herein as conspirator, but not as a defendant, did knowingly and wilfully conspire to commit an offense against the United States in violation of Title 18, Sections 2113(a) and 2113(d), United States Code, by conspiring to knowingly and wilfully, by force, violence, and intimidation, take from the person and presence of employees of a bank, money in the care, custody, control, management and possession of the said bank the deposits of which bank would then and there be insured by the Federal Deposit Insurance Corporation and in commission of this act and offense the defendant, JOSEPH J. JACOBS, and Brian Toth, named herein as a conspirator, but not as a defendant, would assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of dangerous weapon. (Title 18, United States

Code, §371).

In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, the defendant JOSEPH J. JACOBS and Brian Toth, named herein as a conspirator but not as a defendant, committed the following:

OVERT ACT

1. On or about the 27th day of July, 1976, within the Eastern District of New York, the defendant, JOSEPH J. JACOBS, knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Citibank, 35-31 Francis Lewis Boulevard, Queens, New York, approximately One Thousand Nine Hundred Ninety Seven Dollars and Ninety Five Cents (\$1,997.95), in United States currency, which money was in the care, custody, control, management and possession of the said Citibank the deposits of which Citibank were then and there insured by the Federal Deposit Insurance Corporation and in commission of this act and offense the defendant JOSEPH J. JACOBS did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon.

A TRUE BILL

FOREMAN

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

CHARGE

THE COURT: Ladies and gentlemen of the jury:

Now that you have heard the evidence and the arguments it becomes my duty to give you the instructions of the court as to the law applicable to this case.

Is it [sic] your duty as jurors to follow the law as stated in the instructions of the court, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors, and to arrive at a verdict by applying the same rules of law, as given in the instructions of the court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the "Not Guilty" plea of the accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed

by sympathy, prejudice or bias: Both the accused and the government expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the court and reach a just verdict, regardless of the consequences.

The attorneys, both the government and defendants, have been permitted by the court and by the rules to make opening statements and summations to you. Under no circumstances are the statements they have made by way of opening or by way of summation to be taken as evidence. However, the court and the law does permit you to take the arguments that they have proffered before you and weigh those arguments. And if you agree with what they have said on either side of the case you may use those arguments in your deliberations and in discussing the case with each other, and try to convince one another as to what the final determination shall be with reference to the deliberations at hand.

If you feel that the arguments are not commensurate with the testimony and the proof in the case, you may disregard them. The arguments are not evidence. You need not weigh them. However, there are times when the arguments of the attorneys will give you an insight as to something you may have missed, and you may discuss that portion of it if you so desire.

As I have already instructed you, the court will be the judge of the law. You may recall that some motions were argued at side bar or that you were asked to leave the courtroom from time to time. That was not for the purpose of keeping any of the proof from you, but were matters of law that were discussed between the attorneys and the court itself and should not

have come before you. In any event, if you feel that you have discovered by some stretch of your imagination what this court thinks as to either some of the testimony or the case itself, you should remove that from your mind because I tell you here and now I have come to no conclusion in this case. I have not indicated to you in any way whatsoever what my feeling is with reference to the facts in the case or with reference to the guilt or innocence of the defendants. That is your province and your job. You should not try to weigh what you believe the court's impression may be.

You must understand that the lawyers who appear before you are advocates. They are advocating the best case they can for the parties they represent and they have a right to exercise as much forcefulness as they desire in their questioning or otherwise in presenting their case.

During my precharge I told you among other things that the questions asked by the attorneys are never to be considered as evidence even though the question may contain a statement of evidence. You are reminded that only the answer to the question is evidence, if, of course, the question was answered.

Of course, you know by now that this case has come before you by way of indictment presented by a Grand Jury sitting in the Eastern District. Remember, an indictment is merely an accusation, merely a piece of paper. It is not evidence and is not proof of anything.

The indictment charges as follows:

COUNT ONE: On or about the 27th day of July, 1976,

within the Eastern District of New York, the defendant, JOSEPH J. JACOBS, knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Citibank, 35-31 Francis Lewis Boulevard, Queens, New York, approximately One Thousand Nine Hundred Ninety-Seven Dollars and Ninety Five Cents (\$1,997.95), in United States currency, which money was in the car [sic], custody, control, management and possession of the said Citibank the deposits of which Citibank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, 2113(a)).

COUNT TWO: On or about the 27th day of July, 1976, within the Eastern District of New York, the defendant JOSEPH J. JACOBS knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Citibank, 35-31 Francis Lewis Boulevard, Queens, New York, approximately One Thousand Nine Hundred Seven Dollars and Ninety Five Cents (\$1,997.95), in United States currency, which money was in the care, custody, control, management and possession of the said Citibank the deposits of which Citibank were then and there insured by the Federal Deposit Insurance Corporation and in commission of this act and offense the defendant, JOSEPH J. JACOBS, did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon. (Title 18, United States Code, 2113 (d)).

COUNT THREE: On or about and between the 25th day of July, 1976, and the 27th day of July, 1976, both dates being approximate and inclusive, within the Eastern District of New York,

the defendant, JOSEPH J. JACOBS and Brian Toth, named herein as a conspirator but not as a defendant, did knowingly and wilfully conspire to commit an offense against the United States in violation of Title 18, Sections 2113(a) and 2113(d), United States Code, by conspiring to knowingly and wilfully, by force, violence, and intimidation, take from the person and presence of employees of a bank money in the care, custody, control, management and possession of the said bank the deposits of which bank would then and there be insured by the Federal Deposit Insurance and in commission of this act and offense the defendant JOSEPH J. JACOBS and Brian Toth, named herein as a conspirator, but not as a defendant, would assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon. (Title 18, United States Code, 371).

In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, the defendant JOSEPH J. JACOBS and Brian Toth, named herein as a conspirator but not as a defendant, committed the following:

OVER ACT: L. On or about the 27th day of July, 1976, within the Eastern District of New York, the defendant, JOSEPH J. JACOBS knowingly and wilfully, by force, violence and intimidation, did take from the person and presence of employees of the Citibank, 35-31 Francis Lewis Boulevard, Queens, New York, approximately One Thousand Nine Hundred Ninety Seven Dollars and Ninety Five Cents (\$1,997.95), in United States currency, which money was in the care, custody, control, management and possession

or the said Citibank the deposits of which Citibank were then and there insured by the Federal Deposit Insurance Corporation and in commission of this act and offense the defendant JOSEPH J. JACOBS did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon.

Count 1, if you will notice, is the count which does not charge the commission of the crime with a dangerous weapon.

Count 2, is the count that charges the commission of a crime with a dangerous weapon.

Count 3, at this point I will advise you, is known as the conspiracy count.

Some pf the persons named in the indictment have not been on trial here; some of them are out of this trial for various reasons. The reasons why the other persons are not part of this trial have no bearing whatsoever on the guilt or innocence of the defendant who is on trial. You are not to speculate as to the reasons for the absence for this trial of the other persons named in the indictment. You are to consider only the guilt or innocence of the defendant before you here.

Count One of the indictment charges a violation of Title 18, United States Code, Section 2113(a). That section provides, in pertinent part:

"Whoever, by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to,

or in the care, custody, control, management, or possession of a bank. . . shall be guilty of a crime.

In order for you to convict the defendant on Count One, the government must prove beyond a reasonable doubt each of the following elements:

First: The acts or acts of taking, from the person or presence of another, money belonging to or in the care, custody, control, management, or possession of a bank, as charged;

Second: The act or acts of taking such money by force or violence, or by means of intimidations;

Third: Doing such act or acts knowingly and wilfully.

The charges in this indictment require the government to prove that the defendant knowingly and wilfully performed acts in violation of law. The Court will therefore define the words "knowingly" and "wilfully."

An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of mistake, or accident or other innocent reason.

An act is done "wilfully" if done voluntarily and intentionally, and with specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

As I have already stated, the money taken must have been in the care, custody, control, management or possession of the bank. The law recognizes two kinds of possession: actual pos-

session and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

If you should find beyond a reasonable doubt from the evidence in the case that, at the time and place of the alleged offense, the Citibank, either alone or jointly with others, had actual or constructive possession of the money described in the indictment, then you may find that such money was in the possession of the Citibank, within the meaning of the word "possession" as used in these instructions.

To take, or attempt to take, "by intimidation" means wilfully to take, or attempt to take, by putting in fear of bodily harm. Such fear must arise from the wilful conduct of the accused, rather than from some mere tempermental timidity of the victim; however, the fear of the victim need not be so great as to result in terror, panic, or hysteria.

A taking, or an attempted taking, "by intimidation" must be established by proof of one of more acts or statements of the accused which were done or made, in such manner, and under such

and under such circumstances, as would produce in the ordinary person fear of bodily harm.

However, actual fear need not be proved. Fear, like intent, may be inferred from statements made and acts done or omitted by the accused, and by the victim as well; and from all the surrounding circumstances shown by the evidence in the case.

The term "bank", as used in this section means any member bank of the Federal Reserve System and any banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

Let me state to you here that the burden is upon the prosecution to prove beyond a reasonable doubt each and every essential element of the crime charged. Failure to do so requires you to find the defendant not guilty. The burden never shifts to the defendant to prove his innocence. The law never imposes upon a defendant in a criminal case the burden of duty of calling any witnesses or producing any evidence.

Count Two of the indictment charges a violation of Title 18, United States Code, Section 2113(d), which provides in pertinent part:

"Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be guilty of a crime."

In order to convict the defendant of the crime charged

in count 2 of the indictment requires that the government prove beyond a reasonable doubt four essential elements:

1. The act or acts of taking, from the person or presence of another, money belonging to or in the care, custody, control, management or possession of a bank, as charged;

2. The act or acts of taking such money by force or violence, or by means of intimidation;

3. The act or acts of assaulting and of putting in jeopardy the life of any person by the use of a dangerous weapon or device, while engaged in stealing such money from the bank, as charged; and

4. Doing such act or acts knowingly and wilfully.

Any wilfull attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so, or any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault. An assault may be committed without actually touching, or striking, or doing bodily harm to the person of another.

So, a person who has the apparent present ability to inflict bodily harm or injury upon another person, and wilfully attempts or even threatens to inflict such bodily harm or injury upon another person, as by intentionally flourishing or pointing a pistol or gun at another person, may be ground to having assaulted such person.

To "put in jeopardy the life" of a person "by the use of a dangerous weapon" means to expose such person to a risk of death, by the use of a dangerous weapon.

A "dangerous weapon" includes anything capable of being readily operated, manipulated, wielded, or otherwise used by one or more persons to inflict severe bodily harm or injury upon another person. So an operable firearm, such as a pistol, revolver, or other "gun," capable of firing a bullet or other "ammunition," may be found to be a dangerous weapon or device.

Count Three of the indictment charges the defendant with conspiracy to violate sections 2113(a) and 2113(d) of Title 18, United States Code. The concept of conspiracy is complicated, so I direct you to listen very carefully to what I am about to say.

A conspiracy is a combination of two or more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of "partnership in criminal purposes", in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to disobey, or to disregard, the law.

Mere similarity of conduct among various persons, and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be; or the details thereof, or the means by which the object or purpose was to be

accomplished. What the evidence in the case must show beyond a reasonable doubt, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, expressly or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan. The evidence in the case must also establish beyond a reasonable doubt that the alleged conspiracy was knowingly formed, and that one or more of the means or methods described in the indictment were agreed upon to be used, in an effort to effect or accomplish some object or purpose of the conspiracy, as charged in the indictment; and that two or more persons, including the accused, were knowingly members of the conspiracy, as charged in the indictment.

In determining whether there has been an unlawful agreement, you may judge acts and conduct of the alleged members of the conspiracy which are done to carry out an apparent criminal purpose. The adage, "Actions speak louder than words" is applicable here. Usually, the only evidence available is that of disconnected acts on the part of the alleged individual conspirators, which acts, however, when taken together in connection with each other and with the reasonable inferences flowing therefrom, show a conspiracy or agreement to secure a particular result as satisfactorily and conclusively as more direct proof.

If, upon such consideration of all the evidence, direct or circumstantial, you find beyond a reasonable doubt that the minds of the alleged conspirators met in an understanding way and that they agreed, as I have explained a conspiratorial agreement to you, to work together in furtherance of the unlawful schemes

alleged in the indictment, then proof of the existence of conspiracy is established.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

Before the jury may find that a defendant, or any other person, has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed, and that the defendant, or other person who is claimed to have been a member, wilfully participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy.

To act or participate wilfully means to act or participate voluntarily and intentionally, and with specific intent to do something the law forbids; that is to say, to act or participate with the bad purpose either to disobey or to disregard the law. So, if a defendant, or any other person, with understanding of the unlawful character of a plan, knowingly encourages, advises, or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a wilful participant-a conspirator.

One who wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed, the jury should consider the actions and declarations of all the alleged

participants made in furtherance of the common scheme. However, in determining whether a particular defendant was a member of the conspiracy, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of its members.

Whenever it appears beyond a reasonable doubt, however, that a conspiracy existed and that a defendant was one of its members, then the statements thereafter knowingly made and the acts thereafter knowingly done by some other member of the conspiracy, may be considered by you as evidence against the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of that defendant, provided such statements and acts were knowingly made or done during the continuation of the conspiracy, and in furtherance of some object or purpose of the conspiracy.

Any statements or acts of any conspirator, which are not made or done in furtherance of the conspiracy, or which are made or done before its existence or after its termination may not be considered as evidence against anyone other than the maker or actor.

The guilt of a conspirator is not governed by the extent or duration of his participation in the conspiracy, or whether he had knowledge of all of its operations. Even if one joined the conspiracy after it was formed, and was engaged in it to a degree more limited than that of other co-conspirators, he is equally culpable, so long as he was a co-conspirator. Each member of a conspiracy may perform separate and distinct acts at different

times and different places. Thus, some conspirators may play major roles, while others play minor parts.

In other words, it is not required that a person be a member of the conspiracy from its very start - he may join it at any point during its progress and be held responsible for all that has been done before he joined, and all that may be done before he joined, and all that may be done thereafter during its existence and, he may be charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

Four essential elements are required to be proved in order to establish the offense of conspiracy charged in the indictment:

First: That the conspiracy described in the indictment was wilfully formed, and was existing at or about the time alleged;

Second: That the accused wilfully became a member of the conspiracy:

Third: That one of the conspirators thereafter committed an overt act in furtherance of the conspiracy: and

Fourth: That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy, as charged.

If you should find beyond a reasonable doubt from the evidence in the case that existence of the conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy some overt act was knowingly done by one of the members of the conspiracy in furtherance of some object or purpose

of the conspiracy, then proof of the conspiracy offense charged is complete.

An "overt act" is any act knowingly committed by one of the defendants or co-conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature, if considered separately and apart from the conspiracy. It may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

In your consideration of the evidence in the case as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed, as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not the accused wilfully became a member of the conspiracy.

If you are not convinced beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was wilfully formed, and that the defendant wilfully became a member of the conspiracy either at its inception or afterwards, and that thereafter one or more of the conspirators knowingly committed one or more of the overt acts charged in furtherance of some object or purpose of the conspiracy, then you must acquit the defendant.

If, however, you are convinced of these factors beyond

a reasonable doubt, then you may convict the defendant.

Keep in mind that it is the agreement to violate the law which constitutes the offense charged in Count Three. Thus, you may find the defendant guilty of conspiracy, even if you do not find him guilty of the substantive counts. Likewise, you may find the defendant guilty of the substantive counts (Counts One and Two), even if you do not find him guilty of the conspiracy count.

Keep in mind that there is testimony and evidence in this case which relates to events occurring after July 27, 1976, the date on which the bank robbery charged in Counts One and Two of the indictment occurred. While such testimony may be considered by you on the question of the existence of a criminal partnership for the purpose of the conspiracy count, it may not be considered in determining whether the defendant in fact committed the crimes charged in Counts One and Two, which are the substantive counts. Only the evidence and testimony specifically relating to the bank robbery on July 27, 1976 may be considered by you in deciding whether the Government has proved every essential element of the crimes charged in Counts One and Two beyond a reasonable doubt.

There are two types of evidence from which you may find the truth as to the facts of a case - direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or

circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendants beyond a reasonable doubt, you must find them not guilty.

A defendant is presumed innocent of the crime. Thus the defendant, although accused, begins the trial with a clean slate and with no evidence against him, and the law permits nothing but legal evidence to be presented before a jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant unless you, the jury, are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the Government prove ^{guilt} beyond all possible doubt. The test is one of reasonable doubt, and reasonable doubt is doubt based upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

You, the jury, will remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. If the jury views the evidence in the case as reasonably permitting either

of two conclusions, one of innocence, the other of guilt, you, the jury, must, of course, adopt the conclusion of innocence.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof.

You, the jury, may make common sense inferences from the proven facts.

It is not necessary that all inferences drawn from the facts in evidence be consistent only with guilt and inconsistent with every reasonable hypothesis of innocence.

You, as jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves, and it goes without saying that you should scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and his demeanor and manner while on the stand. Consider the witness' ability to observe the matters to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness in either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such creditability, if any, as you think it deserves.

If you find any witness lied as to any material facts in the case - or wilfully testified falsely - then the law gives you certain privileges. One of those privileges is that you have the right to disregard the entire testimony of that witness. If you find, however, that you can sift through that testimony and determine which of the testimony is true and which was false, then the law allows you to take the portions which were true and weigh it and disregard those portions which were false. That again is within your prerogative.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence. You may find the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of

witnesses on the other side.

You are not obliged to accept testimony, even though the testimony is uncontradicted and the witness is not impeached. You may decide, because of the inherent improbability of his testimony, or for other reason sufficient to you, that such testimony is not worthy of belief.

The Government is not required to prove the essential elements of the offense as defined in these instructions by any particular number of witnesses. The testimony of a single witness may be sufficient to convince you beyond a reasonable doubt of the existence of an essential element of the offense charged, if you believe beyond a reasonable doubt that the witness is telling the truth.

The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserved.

An act or omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident

or other innocent reason.

Some of the witnesses who testified before you here were admitted participants in the crime with which these defendants are charged. Such a person, however, does not become incompetent as a witness simply because of his participation in the crime charged. The mere fact that a witness may have participated in the crime charged does not mean that he cannot tell the truth. It only means that you are to examine his testimony with great care, and, if having done so, you believe it to be the truth, then you are to give it the same credence as the testimony of other witnesses. The testimony of such a person alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty even if uncorroborated or unsupported by other evidence. Keep in mind, however, that you must receive such testimony with caution and weigh it with great care before you accept it. You should not convict on the basis of the unsupported testimony of a participant in the crime unless you believe such testimony beyond a reasonable doubt.

Certain witnesses who testified before you here have received immunity from punishment in exchange for their testimony. Such testimony must be examined and weighed by you with greater care than the testimony of an ordinary witness. Again, this does not mean that such a person cannot tell the truth, but you must determine whether such testimony has been affected by interest, or by prejudice against the defendant.

If, after such consideration, you find such testimony to be truthful, you may give it whatever weight you believe it deserves.

The law does not require the prosecution to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require the prosecution to produce as exhibits all papers and things mentioned in the evidence.

However, in judging the credibility of the witnesses who have testified, and in considering the weight and effect of all evidence that has been produced, the jury may consider the prosecution's failure to call other witnesses or to produce other evidence shown by the evidence in the case to be in existence and available.

You have heard testimony in this case regarding certain fingerprints. The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to the relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

The law does not compel a defendant in a criminal case

to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the failure of a defendant to testify.

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

In making the factual determination on which your verdict will be based, you may consider only the exhibits which have been admitted in evidence and the testimony of the witnesses as you have heard it in this courtroom.

There is nothing peculiarly different in the way a jury should consider the evidence in a criminal case, from that in which all reasonable persons treat any question depending upon the evidence presented to them. You are expected to use your good sense; you are not to compromise your position; consider the evidence in the case for only those purposes for which it has been admitted, and give it a reasonable and fair construction, in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If all accused be proved guilty beyond a reasonable doubt say so. If not so proved guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict of guilty upon anything other than the evidence in the case; and remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The punishment provided by law for the offenses charged

in the indictment is a matter exclusively within the province of the Court, and should never be considered by the jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused.

If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

Now, in this type of case there must be a unanimous verdict, that means all twelve of you must agree, and it goes without saying, that it becomes incumbent upon you to listen to one another and to argue out the points among yourselves in order to determine in good conscience whether your fellow jurors' argument is one commensurate with yours or whether you can with good conscience agree with him. You have no right to stubbornly and idly sit by and say, "I am not talking to anyone," "I am not going to discuss it," because people with common sense and the ability to reason must communicate their thoughts. So, anything which appears on the record and about which one of you may not agree - talk it out amongst yourselves and then if you can't agree as to what is in the record, well, you can ask the Court to have that portion of the testimony read back to you. You can ask the Court to have a portion of the charge read back to you. You may do so by knocking on the door and giving a note in writing to the Marshal who will then present it to the Court, and I will then bring you into the courtroom.

The foreman, Mr. Meehan, will preside over your deliberations, and will be your spokesman here in Court.

If you should find the defendant not guilty on all three counts, then you must announce your formal verdict: We the jury find the defendant not guilty on all three counts.

If you should find the defendant guilty on all three counts, then your formal verdict will be: We the jury find the defendant guilty on all counts.

If you find the defendant guilty on Count One, guilty on Count two, and not guilty on Count three, you should announce your verdict: We the jury find the defendant guilty on Count one, guilty on Count two and not guilty on Count three or whatever the case may be; so when you have a different verdict, if you do have it, you will announce the different verdict on each count.

Now, Mr. Foreman, ladies and gentlemen of the jury, you have heard the complete charge and the law to be applied to the facts.

Is there any part of the charge that you do not understand about which you might be confused which you would like to have repeated to it before commencing deliberations, you may do so.

Of course, you shall have a right to have the Court read back any part of the charge at any time during your deliberations.

Do you wish any part of it read or are you willing to deliberate as it has been read to you.

(No response from the jury.)

THE COURT: Well, that is the Court's charge.

Just one moment.

Gentlemen, just be seated for a moment.

Evidently, two pages of my charge were together and I must have turned the two of them as one. Since the charge runs together and any page could be substituted, I have written it, and what I will do is read the reasonable doubt charge over to you so there will be no question of confusion as to where to fit it in.

A defendant is presumed innocent of a crime. Thus a defendant, although accused, begins the trial with a clean slate and with no evidence against him, and the law permits nothing but legal evidence against him, and the law permits nothing but legal evidence to be presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant unless you, the jury, are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt, and reasonable doubt is doubt based upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

You, the jury, will remember that a defendant is never

to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. If the jury views the evidence in the case as reasonably permitting either of two conclusions one of innocence, the other of guilt, you, the jury, must of course, adopt the conclusion of innocence.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof.

You, the jury, may make common sense inferences from the proven facts.

It is not necessary that all inferences drawn from the facts in evidence be consistent only with guilt and inconsistent with every reasonable hypothesis of innocence.

The test is one of reasonable doubt and should be based upon all the evidence, the testimony of the witnesses, the documents offered into evidence, and the reasonable inferences which can be drawn from the proven facts.

An inference is a deduction or conclusion which reason or common sense leave the jury to draw from the facts which have been proved. You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to

to the bald statements of the witnesses. On the contrary, you are permitted to draw, from the facts which you find have been proved such reasonable inferences as seem justified in the light of your own experience.

Now, that is the complete charge.

THE GOVERNMENT SHOULD BE BARRED
FROM INTRODUCING PROOF OF OTHER
CRIMES AT THE TRIAL OF THIS
ACTION.

Based on my meeting with Mr. Schulman, I believe there exists a strong possibility that testimony will be offered which would show that a bank robbery was being planned, or was to be committed in Yonkers on August 2, 1976.

Since the event occurred after the commission of the bank robbery at bar, it certainly cannot be offered for motive, opportunity, intent, preparation or plan. A bank robbery by force is, by its nature, an unequivocal act. As such, there can be no logical defense of mistake or accident. One cannot mistakenly or accidentally rob a bank.

Therefore, the only theories upon which such evidence could be offered are knowledge or identity. Probably this would be connected with the introduction of physical evidence discussed earlier. If this is so, its prejudicial effect far outweighs its probative value (Rule 403, Rules of Evidence For United States Courts and Magistrates).

Rather than have the Government attempt to offer such evidence and then have a determination out of the presence of the jury, we seek a pre-trial ruling at a conference with the Court. In this manner, the jury would not be left with any residual impressions of testimony that might be stricken.

Accordingly, we seek a pre-trial offer of proof under 403 and 404(b) of the Federal Rules of Evidence.

EVIDENCE OF THE AUGUST 2, 1976
ATTEMPTED BANK ROBBERY IN
WESTCHESTER COUNTY SHOULD BE
ADMITTED.

It is anticipated that the proof at trial will show that the July 27, 1976 robbery of the Citibank was part of defendants plan to rob several banks, each robbery to be financed in part by the next. The evidence will show that the defendant felt that the \$2,000 he had stolen was much too little and that as a result he was anxious to commit another robbery as soon as possible. Before the next week was out Jacobs had contacted Toth and arrangements were made to rob a bank in Westchester County. Toth recruited a new member Steven Seifert to be the driver. On the morning of August 2, 1976 Jacobs, Toth and Seifert drove to Westchester in a Cadillac borrowed from a friend. At a prearranged switch site they transferred to a waiting stolen Ford. Seifert drove the Ford to a nearby bank while Toth and Jacobs crouched in the back seat holding guns, their faces covered by masks. Milling crowds caused plans to be aborted on two successive passes at the bank and a decision was made to postpone any further attempts to later in the day. Upon returning to the switch site Jacobs, Toth and Seifert realized they were being surveilled and split up in an attempt to elude their pursurers. A bag containing bait bills and guns was thrown from the Cadillac. As detailed above all three were seized and the weapons and masks were recovered. Upon being stopped Toth and Jacobs both made statements to the effect that they did not know each other. Jacobs claimed to have been lost after leaving all night party

he had been attending.

Evidence of other crimes is admissible under Rule 404(b) of the Federal Rules of Evidence to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accidents.

It is clear that such acts may be either prior or subsequent acts, United States v. Diorio, 451 F. 2d 21 (2d Cir. 1971), cert. denied, 405 U.S. 955 (1972). In the United States v. Nathan 476 F. 2d 456 (2d Cir. 1973), cert. denied, 414 U.S. 823 (1974) the court held that:

Evidence of a conspirator's post-conspiracy activity is admissible if probative of the existence of a conspiracy or the participation of the alleged conspirator. Lutwak v. United States, 344 U.S. 604, 617-19 (1953); United States v. Bennett, 409 F. 2d 888, 893 (2d Cir.), cert. denied, 396 U.S. 852 (1969). Nathan, 476 F. 2d at 460. See also United States v. Super, 492 F. 2d 319, 323 (2d Cir.), cert. denied, 419 U.S. 876 (1974)).

The events in Westchester on August 2, 1976 were an inextricable part of the plan of the defendant and part of the guilty act itself. Case law has consistently held that proof of other crimes is admissible when logically connected with the crime charged or reveals the entire plan or design. United States v. Campanile, 516 F. 2d 288, 292 (2d Cir. 1975); United States v. Bozza, 365 F. 2d 206, 213 (2d Cir. 1966); United States v. Baker, 419 F. 2d 83, 86 (2d Cir. 1969), cert. denied, 397 U.S. 971 (1970).

Moreover, defendants participation in this crime bears

directly on the question of identity, not only as similar act, but by providing evidence that links him directly to the bait money taken from the Francis Lewis branch of the Citibank and the shotgun used in that robbery. It is clear that the events in Westchester and intricately a part of the Government's proof in this case.

